No. 2601

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OLD COLONY TRUST COMPANY, as Trustee,

Appellant,

v.

CITY OF TACOMA,

Appellee.

BRIEF OF COUNSEL FOR APPELLANT

Upon Appeal From the United States District Court for the Western District of Washington, Southern Division.

JAMES B. HOWE, Seattle, Washington,
JOHN A. SHACKLEFORD, Tacoma, Washington,
Counsel for Appellant.

LOWMAN & HANFORD CO., SEATTLE

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STATEMENT.

This appeal presents the following question:

SHALL A DECREE IN EQUITY BE AFFIRMED WHICH DISMISSED THE BILL OF AN INNOCENT MORTGAGEE TRUSTEE, FILED TO PROTECT FROM FORFEITURE TRUST PROPERTY SUBJECT TO THE LIEN OF ITS MORTGAGE, WHEN THE ALLEGED RIGHT TO FORFEIT IS BASED UPON ACTS OF THE MORTGAGOR, DONE IN GOOD FAITH AFTER THE EXECUTION OF THE MORTGAGE, AND WHEN THE MORTGAGEE WAS NOT A PARTY TO THE PROCEEDING TO FORFEIT AND HAD NO NOTICE OR KNOWLEDGE EITHER OF SUCH PROCEEDING OR OF ANY ACT UPON WHICH SUCH PROCEEDING WAS FOUNDED?

The appeal in this case is from a decree dismissing the bill of appellant, filed to enjoin appellee from

asserting the forfeiture of a franchise, and from asserting title to a certain electric power line operated thereunder in the City of Tacoma. The franchise and power-line involved were and are subject to the lien of a mortgage executed to appellant as trustee by the Tacoma Railway & Power Company, hereinafter called the Power Company, to secure bonds of the Power Company duly issued and now outstanding to the amount of $1,300,000. The franchise was granted to the Power Company by the City of Tacoma by Ordinance 2295, approved February 9, 1905, and the power line was thereafter constructed and operated thereunder. In 1913 a controversy arose between the Power Company and appellee. The Power Company was then selling electric power to the Northern Pacific Railway Company, hereinafter called the Railway Company, at a voltage of 2,300 volts, which voltage was too high for lighting purposes. The Railway Company, on its own premises, transformed some of such power to a lower voltage and used it for lighting purposes. Appellee claimed that the sale of power by the Power Company to the Railway Company, and the transformation of a portion of such power into light, constituted a violation on the part of the Power Company of the provisions of the franchise granted to the Power Company, which provided that the grantee should not—

> "Supply electric current to be used, directly or indirectly, for lighting purposes or to run motors, dynamos or other machines by which electric current shall be generated for lighting

purposes, to any firm, association or corporation."

The Power Company claimed that the act of the Railway Company in transforming the power after its purchase from the Power Company constituted neither a breach of the franchise nor a failure on the part of the Power Company to perform any obligation imposed by the franchise. The Power Company instituted suit against appellee in the Superior Court of the State of Washington for Pierce County, to enjoin appellee from forfeiting the franchise, and to protect itself in its right to sell power to the Railway Company. In its answer and cross-complaint, appellee in the suit in the state court because of such sale and use of power, claimed a forfeiture of the franchise. The state court adjudged a forfeiture. Appellant was not a party to any step taken to forfeit the franchise, and had neither notice nor knowledge of any such step. Appellant then instituted this suit to enjoin appellee from asserting the forfeiture of the franchise and from claiming title to the power line, and also to remove appellee's claim of forfeiture as a cloud on the title to the mortgaged franchise and power line. The decree appealed from denied appellant all relief and dismissed appellant's bill of complaint with costs. (pp. 3-30, 35-54, 100.)

SPECIFICATIONS OF ERROR.

Appellant for the reversal of the decree specifies and relies upon the following errors therein:

1. The decree is erroneous in dismissing the bill.

2. The decree is erroneous in holding that the sale of power by the Power Company to the Railway Company at a voltage too high for lighting purposes, and the reduction of the voltage and transformation of the power into light by the Railway Company, constituted ground for forfeiture of the franchise, either against the Power Company or appellant.

3. The decree is erroneous in holding that a forfeiture of the mortgaged property by steps and proceedings to which appellant was not a party and of which it had neither notice nor knowledge, was not void because depriving appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

4. The decree is erroneous in holding that the franchise granted by Ordinance 2295 of the City of Tacoma was subject to forfeiture because of the sale of power for lighting purposes.

5. The decree is erroneous in holding that the City of Tacoma had power to prevent its legislative authority from granting a franchise for the sale of eleteric power for lighting purposes, thus creating a monopoly in the lighting business in favor of the city.

6. The decree is erroneous in holding that the prohibition against the sale of power for lighting purposes, contained in the franchise, was not void.

7. The decree is erroneous in holding that an innocent mortgagee should be denied all equitable relief in a suit instituted to protect the mortgaged property, because its mortgagor, while in good faith litigating to protect asserted contract rights, and believing that no forfeiture would be claimed pending such litigation, was mistaken in such belief.

8. The decree is erroneous in holding that the Power Company, while acting in good faith in the assertion of contract rights which it claimed, was not justified in believing that appellee would not attempt to forfeit the franchise until after a determination of what the contract rights of the parties to the franchise were.

9. The decree is erreoneous in holding that an innocent mortgagee trustee should be deprived of its rights and be denied the protection of a court of equity in a suit to protect the trust property by construing covenants as conditions of forfeiture, and effecting such forfeiture because of acts of the mortgagor done after the execution of the mortgage.

10. The decree is erroneous in holding that the power line became the property of appellee, and that appellant was not entitled to have its mortgage lien thereon protected.

ARGUMENT.

The specifications of error may for convenience be grouped in the propositions hereinafter stated:

I.

(Specifications 1, 2, 3, 7, 8.)

THE DECREE IS ERRONEOUS IN HOLDING THAT ALL EQUITABLE RELIEF SHOULD BE DENIED TO AN INNOCENT MORTGAGEE TRUSTEE SEEKING TO PROTECT ITS TRUST ESTATE FROM FORFEITURE CLAIMED BECAUSE OF ACTS DONE BY THE MORTGAGOR AFTER THE EXECUTION OF THE MORTGAGE IN GOOD FAITH WITHOUT NOTICE TO OR KNOWLEDGE OF THE MORTGAGEE TRUSTEE, AND UNDER THE BELIEF THAT THE LITIGATION BASED THEREON CONSTITUTED A TEST CASE FOR DETERMINING WHETHER THE MORTGAGOR HAD OR HAD NOT THE RIGHT TO DO SUCH ACTS.

In presenting its case to the court, appellant was entirely free from embarrassment by reason of the controversy and litigation between appellee and the Power Company. The decree of the district court, while recognizing such rule to be the law, nevertheless applied the decision of the state court to appellant in the same manner as though appellant were upon certain points bound thereby. This course denied to appellant the benefit of the rule announced by the Supreme Court of the United States:

> "The Trust Company's rights and those of the bondholders whom it represents, were not acquired during or since that suit, but long prior thereto, and the Trust Company was not a party to it. This being so, the Trust Company is free to maintain the present suit, unembarrassed by the decree in the other. *Keokuk & Western R. R. Co. v. Missouri,* 152 U. S. 301, 313. *Louisville Trust Co. v. Cincinnati,* 76 Fed. 296."
>
> *Old Colony Trust Co. v. Omaha,* 230 U. S. 100, 122.

"The mortgage under which the complainant is the trustee, was executed before the suit in

the state court was begun, and we think there is no reason why a mortgage of property interests such as the street grants claimed by the mortgagor company should be concluded by a decree to which only the mortgagor was a party, than if the mortgage had been on a different character of estate. *Baltimore Trust & Guaranty Company v. Mayor etc. of the City of Baltimore,* 64 Fed., 153.

"The learned counsel for the city have not relied upon the decree of the state court as an adjudication binding upon complainant, but they have insisted that the opinion of the Ohio Supreme Court in the case of *City of Cincinnati v. Cincinnati Inclined Plane Railway Company* is to have much the same effect, and as effectually prejudges the question here involved as if the city of Cincinnati had made the present complainant a party defendant to that suit. The contention is that it is the duty of this court to accept that opinion as a conclusive construction of the charter powers of the city of Cincinnati and of the Cincinnati Inclined Plane Railway Company, and likewise a conclusive interpretation of the scope, effect and duration of the various contracts or ordinances under which the mortgaged easements and franchise originated. If this be true, the constitutional right of the complainant as a citizen of a state other than Ohio to have its rights as a mortgagee defined and adjudged by a court of the United States is of no real value. If this court cannot for itself examine the street contracts and determine their validity, effect and duration, and must follow the interpretation and construction placed on them by another court in a suit begun after its rights as mortgagee had accrued, and to which it was not a party, then the right of such a mortgagee to have a hearing before judg-

ing and trial before execution is a matter of form, without substance."

Louisville Trust Co. v. City of Cincinnati, 76 Fed., 296, 300.

In the case just cited, the opinion was by Judge Lurton, afterward Mr. Justice Lurton of the Supreme Court of the United States, and was concurred in by Judges Taft and Hammond, sitting in the Circuit Court of Appeals for the Sixth Circuit. The opinion was also cited with approval in *Old Colony Trust Co. v. Omaha*, 230 U. S., 100.

"When contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case although a different interpretation may be adopted by the state courts after such rights have accrued."

Burgess v. Seligman, 107 U. S. 20, 27;

Board of Commissioners v. Coler & Co., 190 U. S. 437;

Board of Supervisors v. Smith, 111 U. S. 563.

"This decision of the highest court of the state was made after the rights of the Southern Railway Company, whatever they may be, had accrued, in the property and franchise of the Western North Carolina Railroad Company, and, while entitled to the highest respect and consideration, is not conclusive upon this court in determining the rights secured to the purchaser under the decree of foreclosure in the Federal Court."

Julian v. Central Trust Co., 193 U. S. 103.

The district court, in the case at bar, was therefore in error in holding that the construction placed upon the state statutes by the state court in the litigation between the Power Company and appellee was binding upon the district court.

It is therefore submitted that appellant stood in the district court, and now stands in this court, in the same position as though no litigation had taken place in the state court. If this proposition is sound, then the question arises, whether a court of equity upon the record in this case could rightly deny to appellant protection against the forfeiture of the property mortgaged to appellant for the benefit of the bondholders of the Power Company.

The facts upon which this proposition rests are clear. Appellee, in 1905, by Ordinance 2295, granted the Power Company the franchise in controversy. Appellee claimed that the franchise not only did not authorize the Power Company to sell power for lighting purposes, but also that if the Power Company sold power which the purchaser transformed into light, the act of the purchaser in transforming the power into light rendered the franchise subject to forfeiture. The Power Company claimed that its franchise authorized it to sell power, and that its sale of power at a voltage too high for lighting purposes was not a violation of the franchise, and that what the purchaser did with the power could not be converted into a breach on the part of the Power Company. The Power Company also claimed that the Public Service Commission law

of the state, enacted in 1911, required it to serve anyone desiring to purchase power, with power. Whether the contention of the Power Company was correct or incorrect, there is no doubt that there was a dispute between the parties, maintained in good faith on each side. That dispute related to the meaning of the franchise and to the obligations and duties of the Power Company under the Public Service Commission law of the state. Appellee, if it believed that the Power Company was selling current in a manner not authorized by its franchise, and was thereby exercising franchise privileges not granted to it, could by injunction have prevented a continuance of its act. Or, if appellee did not desire to be the actor, it could have made a threat of forfeiture, and the Power Company could have instituted suit to prevent the execution of the threat. Neither course would have required the Power Company to give up in advance of a determination of the questions in controversy, a service which it believed it had a right to perform. The situation, after the controversy arose, which was presented, was as follows: About April 3, 1913, the manager of the Power Company called on the Commissioner of Light and Water of the City of Tacoma, and informed him that while the Company felt that it was not obliged to give up the business of serving the Railway Company with power, nevertheless the Power Company would not take any chance of losing its franchise, and if the city was prepared to take over the entire service to the Railway Company

which the Power Company was then rendering, it would turn such service over to the city. The language of the manager of the Power Company on this point is so clear that it will be here quoted:

> "The resolution revoking the permit (not the franchise) was passed on the second day of April, 1913, and the next morning I called on the Commissioner of Light and Water and told him that while we did not feel that the company was obliged legally to give up the business, we did not want to take any chance whatsoever in connection with our franchise, and we were prepared at that time to turn the total business of the Northern Pacific Railway over to him, if he was prepared to take it over. (p. 59) * * *
>
> "He said he wanted to think the matter over, as to whether I—whether we—should continue to supply the Northern Pacific, and that he would talk to me again about it. I called on him, I believe it was the next day, and had another talk with him, and he said that the city wanted the Tacoma Railway & Power Company to continue to supply the Northern Pacific Railway Company. I told him that we could not afford to do this unless the necessary steps were taken to protect our franchise in the matter, and that I would write him a letter setting forth the company's position and willingness to continue to supply the current, provided the necessary steps were taken to protect us. That was on the 4th day of April, that I wrote a letter and took it to the Commissioner of Light and Water, and he said he thought it was all right, and I suggested that we go and talk to the city attorney about it." (p. 60.)

On April 16, the manager of the Power Company

drafted a letter to be sent to the Commissioner of Light and Water, as follows:

> "Referring to the matter of Tacoma Railway & Power Company furnishing electric current to the Northern Pacific Railway Company, which you understand is being used for lighting purposes, and which the city, as we understand, is to bring an injunction suit to prevent us further furnishing,—I beg to advise you that we will be willing, pending the adjustment of this suit and the determination of the right of the city and the Tacoma Railway & Power Company in the matter,—to continue to supply, and hereby agree to continue to supply, said current until the city is ready to take the business over, provided such arrangements are made with the Northern Pacific Railway Company, and providing the consent of the Commissioner of Public Works is had for the continuance of the same to this arrangement." (Plaintiff's Exhibit 12.)

On the same date, the manager of the Power Company wrote to the general counsel of the company as follows:

> "I am enclosing a letter which I have drawn up with reference to continuing to furnish the Northern Pacific Railway Company with electric current, pending adjustment of the matter through the courts, which I will be pleased to have you make such changes in as you think necessary. I would rather like, if you think it would not have any effect, to leave out the following, in the latter part of the letter: 'Provided such arrangements are made with the Northern Pacific Railway Company.' I have the matter in such shape now that I believe we will be able to get it through without trouble at Monday's legislative meeting. I forgot to

tell you over the telephone that I talked this over with the city attorney, and he agreed that the best way out of it was for the city to bring an injunction suit. I hope he doesn't change his mind before Monday." (Plaintiff's Exhibit 11.)

The same witness testified as follows:

"This is a letter (referring to Exhibit 11), dated April 16, to Mr. James B. Howe, and was written, enclosing a copy of a letter which had been drawn up with reference to continuing the furnishing of the Northern Pacific Railway with electric current pending the adjustment of the matter through the court, and was written after I had a talk with the city attorney in which he had suggested that the best thing was for the city to bring an injunction suit—to prevent the company from furnishing the current as it was furnishing it to the Northern Pacific Railway Company." (p. 61.)

The Commissioner of Light and Water of the City of Tacoma testified that the manager of the Power Company had called on him in reference to the matter, and the witness then testified.

"I told him it was a legal question, that I had nothing to do about that, and that he had better go to see Judge Stiles, and we went in there to see you (Judge Stiles), and you said the same thing,—that it was a thing that had to be threshed out by the courts. It was not for me to say. I had no power to give any concessions one way or the other. (p. 82) * * *

Q. Do you remember whether there was any talk about who should bring suit to thresh out this matter?

A. Yes sir.

Q. What did Mr. Shackleford want?

A. He wanted the city to bring suit.

Q. Do you remember what I told him.
A. Yes sir.
Q. What was it?
A. That the company would have to bring the suit. (p. 83.)"

On the 17th of April, 1913, counsel for the Power Company, answering Exhibit 11, wrote to the manager of the Power Company as follows:

> "I return draft of your letter of April 16 to Hon. Nicholas Lawson, Commisioner of Light and Power of Tacoma. I have interlined in pencil certain amendments which, if you see no objection to inserting, I think it would be wise to insert in your letter. If there is any objection to inserting the amendments which I propose, then do not insert them, because I do not consider them vital; but I believe that if inserted, our position would be somewhat stronger than if the unamended draft of the letter is used. I attach a great deal of importance to the fact that the Tacoma Railway & Power Company is furnishing current for power and that it is the Northern Pacific Railway Company that changes the current so as to be used for light. I think it also well to make the letter clear that you are not simply agreeing to furnish the current until the city is ready to take over the business, but that the city is not to take the business over unless the court finally decides that the Tacoma Railway & Power Company is not entitled to do such business. I do not see any objection to leaving out the sentence 'Provided such araringements are made with the Northern Pacific Railway Company.'" (Plaintiff's Exhibit 13.)

On April 18, 1913, the manager of the Power Company wrote to the general counsel as follows:

"I beg to acknowledge receipt of your letter of April 17, returning draft of letter to the Commissioner of Light and Water with reference to furnishing power to the Northern Pacific Railway. I have rewritten the letter, inserting the amendments which you suggested. I hope to get this through on Monday. A copy of redraft of letter is enclosed for your files." (Plaintiff's Exhibit 14.)

On April 21, 1913, the manager of the Power Company wrote to the general counsel of the company as follows:

"Judge Stiles has been figuring over the matter of the city bringing the injunction suit, and he says he has come to the conclusion that the city is not in a position to do it, as it is bound by its ordinances, and does not feel that the court would feel that it was necessary to bring a suit of that kind,—in view of the ordinance provisions. They will today, however, pass a resolution (a copy of which is enclosed) which, as you will note, orders the Commissioner of Public Works to serve notice on the company that they will repeal the franchise unless we cease furnishing the current for lighting within 30 days; and he says that the proper thing for us to do is to bring an injunction suit against the city to prevent the enforcement of this ordinance, and he says he will agree not to make any objection to a temporary order being granted, and then the matter can be carried along and disposed of in some way. I have agreed with the city attorney, Commissioner of Light and Water and Commissioner of Public Works, to continue furnishing the current as at present, until the matter is finally disposed of. The agreement is the same as copy sent you, although it will be necessary to change the wording with reference to the suit. As

you know, the only lighting current which we are furnishing that is being used to our knowledge, is that to the Northern Pacific Railway Company, and even in the event that we eventually should have to give up that lighting business, I have a plan by which we can keep the bulk of the Northern Pacific power business, amounting to probably $19,000 per year. Please let me know if you think this will have the same effect as the city bringing the injunction suit." (Plaintiff's Exhibit 15.)

The general counsel on May 5th wrote the manager of the Power company as follows:

"I duly received yours in reference to the proposed suit by Tacoma Railway & Power Company against the city, concerning the power contract with the Northern Pacific Railway Company. I do not think the change of program materially affects the matter. I assume that Judge Shackleford will institute the suit. If I can be of any service in the matter I will be glad if you and Judge Shackleford will let me know."

John A. Shackleford, formerly a judge of the Superior Court of the state for Pierce County, and at the time he testified attorney for the Power Company in Tacoma, testified as follows:

"I had several talks with Judge Stiles after the passage of the first resolution, the resolution revoking the permits to furnish light, which had been granted or were supposed to have been granted to the Tacoma Railway & Power Company. Some of these conversations were before the resolution of April 21 was passed. The first talk that I remember having, I talked with Judge Stiles about what method should be pursued with reference to determining the right of the Tacoma Railway & Power Company to furnish electricity to the Northern Pacific, part of

which electricity was used by the Railway Company for lighting purposes. In the course of that talk I remember I made the suggestion that it might not be possible for the company to bring an injunction suit to enjoin the passage of an ordinance forfeiting the franchise. I told Judge Stiles that we were anxious not to endanger the franchise in any way, but we wanted to make some kind of an arrangement about the suit so that the rights of the parties could be determined, and the talk then followed along the line of the city bringing a suit to enjoin the Tacoma Railway & Power Company from furnishing electricity to a consumer, in this instance the Northern Pacific Railway Company, which consumer used the electricity for lighting purposes. I cannot remember exactly what was said at the conversation, but I remember very well that at that time the idea of both myself and Judge Stiles, as expressed in the conversation, was along the line of the city bringing an action. After the second resolution was passed, which contained a threat of forfeiture, I had a talk with Judge Stiles, and I think that Mr. Bean was present at the time. I remember saying to Judge Stiles at that time that I supposed that if the city wanted to put the Tacoma Railway & Power Company out of the power business, that it could probably find some way in which to do so; but it seemed to me a very ill-advised course to pursue, especially in view of the fact that the supply of electricity from the city's own plant was comparatively small. Judge Stiles at that time said that it was not the intention of the city, that he was sure that the city had no idea of putting us out of business, that it wanted to get the lighing business, to protect the lighting business. A day or two before the suit was brought in the state court by the Tacoma Railway & Power Company, Mr. Bean and I went into Judge

Stiles' office together, in regard to getting some written statement in regard to the course to be pursued while the suit was pending with reference to the way the Northern Pacific should be supplied. One of the letters written by Mr. Bean to Mr. Lawson—I do not recall at this time which one it was, but it was one of the letters that was called to Judge Stiles' attention. Judge Stiles then said that he would not agree to the signing of that letter. Mr. Bean said to him, 'Well, when this letter was brought in by Mr. Lawson and myself, you said it was all right.' Judge Stiles said, 'Yes, it is all right. It is a statement made by you there. It is all right in a way, but I won't consent to sign it, because it seems to me that if it was signed it would be a complete defense to any objection that the city might make to the furnishing of power to the Northern Pacific.' I cannot quote his exact words, but that is the substance of his statement at that time. He complained that the understanding had been in existence for some little while, that the company was to bring suit, and that we were delaying about bringing it, and said that if we did not bring one pretty soon he would start something. The next day I started suit, but before I started the suit, I had that conversation with Judge Stiles, and I spoke to him about a temporary injunction in the case, which the company was to bring, and I asked him about fixing the time when we could take up the matter of a temporary injunction. I had not made any application for a restraining order, because I felt it would be better to have some notice in the matter, that the company would be better satisfied to have notice given and a temporary injunction, instead of an *ex parte* restraining order. Judge Stiles said it was not his intention to object to an injunction during the suit, and that if I would send the papers down to him when they

were prepared, that he thought he could get the temporary injunction order entered without any hearing. The complaint in the suit was prepared, and I think, was filed on the 21st of May, 1913, and I believe service was not had on the mayor until the next day. In addition to serving the mayor, as I remember it, I sent down a copy to Judge Stiles. The next day, Judge Stiles sent in his answer and cross-complaint, in which he prayed a forfeiture of the franchise, among other things, and sent me word that he was not willing to consent to a temporary injunction, but wanted to insist on a trial of the case before Judge Easterday within the next few days. I made no objection to the early trial of the case, and the case was tried a few days afterward, before Judge Easterday. Up to the time of the receipt of Judge Stiles' cross-complaint praying for a forfeiture of the franchise, and his refusal to consent to a temporary injunction during the meantime, I had not supposed and had not believed that the city intended to insist upon a forfeiture, although the resolution passed on the 21st day of April was a resolution giving notice that forfeiture would be claimed. I thought from the statement of Judge Stiles that it was not the desire of the city to put the company out of the power business, and from other reports that I received from officers at the city hall, that it was not the intention to insist upon any forfeiture; but Judge Stiles' answer, claiming the forfeiture came one day after the 30th day period was up in which we could have cut off the Northern Pacific. * * *

"Now, I do not want to be misunderstood as charging Judge Stiles with any intent or purpose to perpetrate any fraud on me or on the company. I do not want to be in the position of contending that he artfully set up a scheme by which we would be lulled into security in the

matter, and that he took advantage of us. In fact, I do not believe that; but the situation is this. When this matter started out, the understanding all around was that the matter of whether the company had a right to furnish current to a consumer who used a portion of it for lighting would be fought out without putting the company out of business, as it was sometimes expressed, or without any forfeiture of the franchise. When the change of front came on the part of the city about the matter, they can tell better than I can; but up until the expiration of the thirty-day period after the service of this last resolution, it was our understanding that it was not the purpose or intent of the city to put the company out of the power business. Now, whether it was just a misunderstanding between us or not,—I know that as far as I am concerned that is the way I understood it. * * *

I felt that we had a question which was one of doubt, and a question that should be determined by the proper tribunal, and that was the question whether the customer who buys current has the right to use it for any purpose that he sees fit—there was another question also, whether the pasage of the Public Service law by the state legislature had not modified the franchise so as to make it our duty to furnish a customer with electricity when we could reasonably do so, and when he demanded it, no matter what use he proposed to make of it. In other words, I believe it was a case where we ought to have an opportunity not to be hung first, but to have a trial beforehand." (pp. 75-81.)

Judge Stiles testified for the defendant, and among other things testified as follows:

"The day that I defined the position of the city was when I said to these gentlemen that if

there was any suit to be brought it must be brought by the Tacoma Railway & Power Company. Whenever that was, whether it was sooner or later, that was the time I defined my position, and I do not believe I was called upon to define it before, although, as I say, there were suggestions and hints that the city would bring suit, but I never gave it any weight whatever. Previous to April 21, there had been some discussion as to determining whether the company had a right to furnish power which would be transformed by a customer into voltage sufficiently low for light, but that was not the only point the company was insisting upon. It also insisted that under the Public Service Act it was relieved of all those conditions of the franchise ordinance.

Q. At first, was it not the claim of the company that so long as the company sold the electricity at a voltage too high for light, and as long as the consumer transformed it into a sufficient power for lighting on his own premises, that the company was doing no act forbidden by the franchise,—was not that the claim of the company?

A. Yes, that was the first thing that was mentioned." (pp. 92, 93.)

* * * * * * * *

"Q. Do you recall the conversation with Judge Shackleford in reference to a restraining order?

A. I think he is quite correct about that. If I may explain, as I said a while ago, we know that restraining orders are a matter of course. If he had asked for one, I would not have objected to it, because I expected to have the case tried at once, and the city would not have been suffering from any injunction.

Q. And really, if the case had been expedited, so that there could have been a speedy determination of the right of the city to take

over the business, you would not have had any idea of having the power franchise forfeited?

A. No sir.

Q. And as a matter of fact the city did sustain no damage by reason of the company doing that lighting business from the 23rd day of May until the 22nd (2nd) day of June, that could not have been made whole for a few dollars?

A. As far as money went, there was no great loss." (pp. 96, 97.)

The manager of the Power Company, on cross-examination, testified as follows:

"Q. When was it you say you first came to the city hall and had a talk with reference to that resolution?

A. The day after the resolution passed.

Q. On the third?

A. Yes sir.

Q. Then you came and talked to me?

A. I do not think that I came and talked to you on the same day, but it was the day following.

Q. Now, what did you say?

I said the Tacoma Railway & Power Company was willing and ready to turn over to the City the entire Northern Pacific Railway Company business, or any part thereof, and I explained the situation, the conditions of the wiring the different buildings of the Northern Pacific to the City, and I asked them if they were prepared to take it over. That was on April 3d. The Commissioner of Light and Water said he would have to look into the matter to see what condition they were in, and that he would talk to me about it again. The next day, the 4th day of April, I went to see him again and he said that the City was not prepared to take over the business of the Northern Pacific and he wished the Tacoma Railway

> & Power Company would continue to supply them, and that he would protect us in any way that was necessary, and he suggested that I should write him a letter and have his consent and the consent of the Commissioner of Public Works to the continuation of the supply." (70.)

The witness stated he did not go to the City Council because he first wanted to straighten out the details with the Commissioner of Light and Water, and get it legally right before he went to the Council. That his idea was to get an agreement for the Tacoma Railway & Power Company to continue to supply the Northern Pacific with power until the controversy with the City was settled, and that he explained his purpose very frankly. That he felt if he went to the Council first that the matter would be referred to the city attorney and it would be necessary to retrace his steps and go over it again, that the reason the letter dated April 18th was not written earlier was that a letter had been prepared and shown to Judge Stiles and that Judge Stiles had said the letter was all right, and the witness was attempting to get it signed. That Judge Stiles said there was no reason for apprehension, and that the City had no intention of doing anything to void the franchise, and that the city attorney had said it was a matter of form and that it was all right for us to continue to supply the Northern Pacific and that witness kept insisting on a letter so the records in the matter would be clear.

"Q. That is the reason you wrote this letter of the 18th?

A. Yes, sir, absolutely.

Q. And you endeavored to get Mr. Lawson and Mr. Woods to sign it?

A. Yes, sir.

Q. Isn't it a fact that I would not let them sign it?

A. You never said to me absolutely. You said it was all right, but I know you would not give your consent. (71.)

Q. Explain why you should write a letter suggesting that you were willing to do a thing which you were already bound to do if you had any right?

The Tacoma Railway & Power Company had a contract with the Northern Pacific for the supplying of electric power, and a portion of that power, we understood, had been used for lighting. The city claimed we had no right to furnish this power, which was in turn converted by the Northern Pacific into use for lighting. I felt that that was not the proper position for the city to take; however, we felt that we did not want to jeopardize our property or franchise rights, and wanted to take whatever precaution was necessary to protect ourselves, and at the same time we did not want to lose the business unless it was necessary. But we were willing to give the business to the city, or pay them an equivalent amount, or buy the same amount of power until the matter was adjudicated through the courts. It was for the purpose of preserving the record and protecting ourselves and taking absolutely no chances with our franchise that I, as you say, 'haunted the city hall,' and endeavored to get a written agreement with some of the city officials, and they had assured me that there was no intention on the part of the city of doing anything of that kind." (p. 72.)

Upon being interrogated as to what the witness thought the resolution of April 21 meant, he answered Judge Stiles as follows:

> "You gave me a copy of that resolution, I believe, on the 21st of April, and I sent it to Mr. Howe, and I believed that that resolution was being introduced for the purpose of giving the company some basis for action to test out its rights in the matter, as previous to that time you and I and Judge Shackleford talked the matter over and you told me you did not believe it was proper for the city to bring an action against the company, and I supposed that this was to give the company some basis for bringing action against the city, and we proceeded at that time on that theory. It was at my procurement resolution 6161 was passed." (p. 74.)

The suit by the Power Company was filed on the 22nd day of May, 1913. Up to and inclusive of that day, if the Power Company had cut off service from the Northern Pacific Railway Company, its franchise would have been unimpaired; there would have been no ground for forfeiture.

The complaint of the Power Company against appellee prayed:

> "For a temporary injunction enjoining the defendant during the pendency of this action from repealing said ordinance or declaring the same null and void, and enjoining the said defendant from claiming the forfeiture of the poles, wires or other property that have been located or constructed pursuant to said ordinance within the city of Tacoma, and from interfering with the use by the plaintiff of said poles, wires, appliances and other property in the same manner in which said plaintiff has

heretofore used the same, and that upon the final hearing of this cause said temporary injunction may by the decree of the above entitled court be made perpetual."

It is plain that the object of the complaint was to prevent appellee from repealing the franchise or declaring it null and void, because of the sale of power to the Northern Pacific Railway. The answer and cross-complaint of the city was filed May 23, and in the cross-complaint appellee asked a court of equity to adjudge the forfeiture of the franchise. The reply of the plaintiff was filed June 3, 1913, and the decree of forfeiture was enteerd June 14, 1913. (Defendant's Exhibit C.)

On June 2, 1913, appellee adopted the following resolution:

"Be it resolved by the council of the city of Tacoma: That pending the litigation between the city of Tacoma and the Tacoma Railway & Power Company over the forfeiture of the franchise granted by ordinance 2412 (2295), the city attorney be authorized to stipulate on behalf of the city with said company that the fact that said company continues from this date during the pendency of said litigation to furnish the Northern Pacific Railway Company with electric power in the same manner as heretofore, under said ordinance, shall not be taken or considered as an additional cause for the forfeiture of said ordinance and the franchises held thereunder, provided that from this date the Tacoma Railway & Power Company purchase from the City of Tacoma a quantity of electric power equal to the quantity it shall furnish to said Northern Pacific Railway Company during the pendency of said litigation, in the same manner and under the same regulations

> and at the same price as other electric power consumers of said city. The purpose of this resolution and the proposed stipulation is to preserve to the Northern Pacific Railway Company its usual supply of electric power without any jeopardy or prejudice to the rights of either party to said litigation, and particularly that the city of Tacoma may not by the arrangement herein proposed waive any right to forfeit said franchise which has already accrued." (Plaintiff's Exhibit 4.)

A stipulation pursuant to the resolution was then filed in the state court, and on June 4, 1913, the manager of the Power Company entered into an agreement with the city to take the power from the city covered by the resolution of June 2, 1913, and the city not then being ready to furnish such power, the Power Company waived the date of making connection for its being furnished. (Plaintiff's Exhibits 6 and 7.)

The Power Company carried out its contract to purchase from the city at the city's rates an amount of power equal to the power sold by the company to the Northern Pacific after June 2, (p. 66.)

It will therefore be seen that the decree of the district court denied the mortgagee trustee relief against an asserted right to forfeit the mortgaged property because the Power Company asserted the right under its franchise to sell power to the Northern Pacific Railway and did sell power to the Northern Pacific Railway from May 22, 1913, to June 2, 1913, which power the Railway Company transformed into light, and because that during that time

appellee objected to the action of the Power Company. According to the contention of appellee, the franchise of the Power Company could not be forfeited because the Power Company furnished power to the Railway Company which the Railway Company transformed into light, unless such furnishing of power was done after May 22, 1913; and on June 2, 1913, appellee for valuable consideration waived its right to claim a forfeiture because of power so furnished on and after June 2, 1913, but undertook to reserve its right to insist on a forfeiture because of acts done between the 22nd day of May, 1913, and the 2nd day of June, 1913. The court will see, therefore, that the right is asserted in a court of equity to forfeit trust property where no damage has been caused to the party claiming the forfeiture, where the acts constituting the basis of forfeiture were not done by the trustee mortgagee, but by the mortgagor under an assertion of right and where the thing done was not a failure to perform, but was claimed by appellee to be something which the mortgagor had not been authorized to do.

Moreover, the Power Company was serving the Railway with electricity and section 33 of the Public Service Commission Law (Laws 1911, p. 561) provided that:

> "Every * * * electrical company * * * engaged in the sale and distribution of * * * electricity * * * shall upon reasonable notice furnish to all persons and corporations who may apply therefor and be reasonably entitled thereto, suitable facilities for furnishing and

furnish all available * * * electricity as demanded."

Whether this law of 1911 required a continuance of service notwithstanding the franchise provision was certainly a matter which could not be resolved against the obligation without some doubt on the subject.

State ex rel Webster v. Superior Court, 67 Wash. 37;

Seattle Electric Co. v. Seattle, 206 Fed. R. 955.

Puget Sound Traction Light & Power Co. v. Reynolds, 223 Fed. R. 371;

State ex rel Case v. Howell, Wash. Dec., Vol. 43, p. 112.

Such being the case should an error of judgment be visited with forfeiture?

The district court found that the evidence showed:

"1. That the officers of the Tacoma Railway & Power Company were not acting in hostile defiance of the requirements of the resolution.

2. That the city was not prepared at this time to immediately take care of all of the needs of the Northern Pacific Railway Company being supplied by the Tacoma Railway & Power Company under its contract with that company.

3. That the officers of the Tacoma Railway & Power Company were acting under the belief that the city's officers, on account of the foregoing fact, would not insist upon a forfeiture pending an adjudication in court of the question that had arisen between the Tacoma Railway & Power Company and the city, even though the former did continue to furnish elec-

tric power under its contract to the Northern Pacific Railway Company of too high a voltage for light, but which was by the Northern Pacific Railway transformed on its own premises to a lower voltage and used for lighting purposes.

4. These officers of the Tacoma Railway & Power Company acted in the evident belief that the resolution of April 21 was to be treated as a threat of forfeiture, only as a step deemed —as they understood—by both the officers of the Tacoma Railway & Power Company and the city to be necessary in order to bring the matter into court for adjudication, and made without any real purpose on the part of the city or its officers to actually forfeit the franchise in pursuance of the resolution in case the company failed to comply with the requirements of the resolution within the thirty days therein provided." (p. 51.)

It is respectfully submitted that upon the foregoing facts no rule of law applicable thereto will sustain a decree forfeiting the mortgaged property and destroying the trust property which appellant holds as security for the bondholders of the Power Company.

The language of Lord Esher, in replying to the address of the attorney general on the occasion of Lord Esher's retiring from the office of Master of the Rolls, is applicable to this case (*Police Powers,* Russell 3):

> "The duty of the judge is to find out what is the rule to which people of candor and honor and fairness in the position of the two parties would apply in respect to the matter in hand. That is the common law of England, and there is no other law. It is not only the common

> law, but if we go to equity, it is the same thing. The law of England is not a science, it is a practical application of the rules of right and wrong to the particular case before the court, and the canon of law is that that rule should be adopted and applied to the case which people of honor and candor and fairness in such a transaction would apply to each other. Now, if that be so, if any supposed rule of law is put forward which would prevent the rule of right being applied, the supposed rule of law must be wrong."

Is there any doubt that as between man and man, any judge would hesitate to say that under the circumstances of this case, candor and honor and fairness estop the city of Tacoma from depriving the bondholders of the Power Company of their security because of an act of the Power Company done in good faith and without the knowledge of the bondholders between the 22nd day of May and the 2nd day of June, 1913, and which caused no loss to the City of Tacoma? Any supposed rule of law put forward to uphold a forfeiture under the circumstances of this case is only a supposed rule of law, it is not one which, if examined, can be sustained.

> "A written contract cannot be set aside merely because one of the parties to it put an erroneous construction on the words in which it was expressed, but this principle does not apply to a case where a mistake by one of the parties as to the meaning of the words used has been induced, however innocently, by the other."
>
> *Syllabus, Wilding v. Sanderson,* L. R. 2 Ch. D. (1897) 534.

Hickman v. Berens, L. R. 2 Ch. D. (1895) 638.

Beauchamp v. Winn, 6 House of Lords 223.

Haviland v. Willetts, 35 N. E. 958.

Pomeroy Eq. Jur., 3rd Ed., Secs. 847-849, 860, 451, 452.

II.

(Specification 4.)

THE FURNISHING OF ELECTRIC CURRENT TO THE NORTHERN PACIFIC RAILWAY COMPANY, WHICH WAS TRANSFORMED BY THAT COMPANY INTO LIGHT, WAS NOT, UNDER THE PROVISIONS OF THE FRANCHISE, GROUND OF FORFEITURE.

Ordinance 2295 of the city of Tacoma, in Section 1, granted authority to the Power Company to construct and maintain a power line—

> Section 1. "For the purpose of transmitting, distributing and selling electric current to be furnished and used for the purpose of furnishing power and heat or either of them, and the further right to charge for such current a reasonable compensation, and for any other use or uses to which electricity may be put except as hereinafter provided; provided, that neither said Tacoma Railway & Power Company nor its successors or assigns shall have any right to supply electric current to be used directly or indirectly for lighting purposes, or to run motors, dynamos or other machines by which electric current shall be generated for lighting purposes, to any person, firm, association, or corporation, except where the grantee herein, its successors and assigns, may furnish current for street railway purposes, then and in that event current may be sold for lighting street cars, but for no other lighting purpose whatever. It is the intention of this section to grant to the Tacoma Railway & Power

Company, its successors and assigns, the right to sell power for power and heating purposes, and for lighting street cars, but in no event except as hereinafter provided shall the said grantee, its successors or assigns, furnish power to be used for lighting or generating electricity for lighting."

Section 11. "That each and every right, privilege and authority and franchise by this ordinance granted, shall, without the passage of any resolution, ordinance or any action of any kind whatsoever on the part of the City of Tacoma, be null and void and absolutely of no effect, upon the failure of said grantee, its successors or assigns to perform any and all of the conditions in this ordinance specified and mentioned for a period of thirty days after notice shall have been served upon said grantee, its successors and assigns, by the Commissioner of Public Works of said city, under the direction and authority of the city council of said city, to the effect that said city will, if said falure is not corrected before the expiration of thirty days from the service of said notice, consider this franchise null and void and absolutely of no effect, because of the failure of said grantee, its successors and assigns, to perform any or all of the conditions in this ordinance specified. * * * "

Section 17. "This grant is subject to the right of the city council at any time on thirty days' written notice to said grantee, its successors and assigns, by the Commissioner of Public Works, authorized so to do, hereafter to repeal, change or modify this grant if the franchise granted hereby is not operated in accordance with the provisions of this ordinance or at all, and the city council reserves the right so to do, and this section shall be considered as cumulative and an additional remedy to that provided by section 11 of this ordinance."

Ordinance 2295 imposed numerous obligations upon the grantee requiring affirmative performance on its part, among which were the contributing to the cost of construction of bridges, the payment of a percentage upon gross receipts, and the contingent furnishing of electric current to the city.

It is submitted that the proper construction of section 1 is that the supplying of electric current for lighting purposes even at a voltage low enough for such purposes would not constitute a breach of any condition of the franchise, and the language used in section 1 was not intended to declare that such act would constitute a breach. The language was used for the purpose of making it clear that the franchise granted to the grantee was for the purpose of enabling it to furnish electric current for power and heat and, excepting light, any other use to which electricity might be put, but that no franchise was granted authorizing the grantee to furnish electric current for lighting purposes or to operate machines by which electric current might be generated for lighting purposes. If, therefore, the grantee furnished electric current for lighting purposes, the act would not constitute a breach of a condition of the franchise to furnish current for power and heat, but it would be an act which the grantee had been granted no authority to do. If an electric street railway company should have a franchise to operate street cars by means of electricity, it might have no power under such franchise to sell electricity for consumption. If it did sell elec-

tricity for consumption, and such sale was not authorized by the franchise, such act might be enjoined. Such sale, however, would not constitute ground for forfeiting the street railway franchise. A careful reading of section 1 makes it plain that the prohibition against furnishing electricity for lighting purposes was not intended to constitute a condition for the forfeiture of the franchise for furnishing electricity for heating and power, but was to negative any possible claim on the part of the grantee that the current which it was authorized to transmit could be disposed of by it for lighting purposes. In other words, the denial of the right of the grantee to transmit current for lighting purposes was intended to constitute a withholding of the franchise for that purpose.

> "Conditions are not favored in law, and are construed strictly because they tend to destroy estates. *4 Kent's Comm.,* 130. *Crane v. Inhabitants of Hyde Park,* 135 Mass., 147. *McKelway v. Seymour,* 29 N. J. Law, 321, 327, *Waterson v. Ury,* 5 Ohio, Cir. Ct. R. 347. *In re Wellington,* 16 Pick., 87, 99. * * * And if it be doubtful whether a clause in a deed be a covenant or a condition, the court will incline against the latter construction. *4 Kent Comm.,* 132. *Greene v. O'Connor,* 25 Atl., 692. *Adams v. Valentine, supra.*"
>
> *Los Angeles v. Swarth,* 107 Fed. 798, 803. C. C. A. 9th Cir.

To the same effect are:

> *Central Christian Church v. Lennon,* 59 Wash., 425.

Carrol County Academy v. Trustees, 47 S. W., 617.

Star Brewery Co. v. Primus, 45 N. E., 145.

Dempwolf v. Graybill, 62 Atl., 645.

Wier v. Simmons, 13 N. W., 873.

Chapin v. School Dist., 35 N. H. 445.

Krueger v. R. R. Co., 185 Missouri, 227, 84 S. W. 898.

Frier v. Sanitarium Co., 115 N. Y. Supp., 734. Affirmed, 92 N. E., 1085.

Patterson v. Patterson, 122 S. W., 169.

Self v. Billings, 77 S. E., 562.

Seaboard Air Line Co. v. Anniston Mfg. Co., 65 So., 187.

Hawley v. Kafitz, 148 Cal., 393, 83 Pac., 248.

Avery v. U. S., 104 Fed., 711.

Union Stock Yards Co. v. Nashville Packing Co., 140 Fed., 701.

Ashland v. Greiner, 50 N. E., 99.

Zweig v. Sweedler, 125 N. Y. Supp., 171.

Forman v. Safe Deposit & Trust Co., 80 Atl., 298.

Brady v. Gregory, 97 N. E., 452.

Wright & Taylor v. Board of Education, 152 S. W., 543.

Perkins v. Kirby, 85 Atl., 648.

Farnham v. Thompson, 26 N. W., 9.

Church v. Bragaw, 56 S. E., 688.

Ecroyd v. Coggeshall, 41 Atl., 260.

Thornton v. City of Natchez, 41 So., 498.

Faith v. Bowles, 37 Atl., 711.

III.

THE FRANCHISE IS NOT SUBJECT TO FORFEITURE EXCEPT FOR FAILURE TO PERFORM AN AFFIRMATIVE ACT REQUIRED OF THE GRANTEE.

Hyde v. Warden, 3 L. R., Exchequer Div., (1877-8), 72.

West v. Dobb, 5 L. R., Queen's Bench (1869-70), p. 460.

Evans v. Davis, 10 L. R. Ch. Div. (1878-9), p. 747.

Doe v. Marchetti, 1 B. & A. D., 715, 109 Eng. Rep. full reprint, 953.

Doe v. Stevens, 3 B. & A. D., 29, 110 Eng. Rep. full reprint, 112.

In *Hyde v. Warden,* 3 L. R., Exchequer Div. (1877-8), pp. 72, 82, the court said:

> "We should, if it were necessary, be prepared to hold that the contention of the plaintiff is correct that the power of re-entering, being only in the event of the lessee 'wilfully failing or neglecting to perform any of the covenants,' does not apply to a breach of a negative covenant. See *West v. Dobb.*"

In *West v. Dobb,* the Lord Chief Baron said (p. 464):

> "The proviso is for re-entry 'in case the lessee should fail in the observance or performance of the covenants on their part.' It would seem only to refer to failure in the performance of affirmative covenants, whereas the covenant in question is a negative covenant, not to do a particular act, and it may be extremely doubtful, more particularly in a case of forfeiture, whether such a proviso would apply to a negative covenant."

In *Evans v. Davis, supra,* the following language was used (p. 757):

> "In almost every lease the proviso for reentry is expressed to be in the event of the 'non-performance or non-observance' of any of the covenants. I have always understood that 'non-observance' refers to the negative covenants, and 'non-performance' to affirmative covenants."
>
> "The law will, when possible, so construe an instrument as to avoid forfeitures, and equity delights, when invoked, to relieve against them by giving compensation for failure to comply, rather than destroying the rights of the parties."
>
> *Cuthbertson v. Morgan,* 62 S. E., 744, 747.

> "Forfeitures not being favored in the law, the provisions upon which they are based must be strictly construed."
>
> *Town of Morris v. King,* 28 N. Y. Supp., 281.

> "It is a principle of universal application that forfeitures are abhorred in the law and will not be declared except in the clearest and most positive cases, or where the contract broken so provides in express terms. A forfeiture will be avoided, if possible."
>
> *State of Wash. ex rel City of Tacoma v. Sunset Tel. & Tel. Co.,* 150 Pac., 427.

Appellee not having been damaged by the act of the Power Company in furnishing power to the Northern Pacific Railway from the 22nd day of May to the 2nd day of June, and having consented to a continuance of the furnishing of such power after the 2nd day of June, 1913, and having

adequate remedies to prevent the furnishing of such power for lighting purposes if it be unlawful for the Power Company to furnish power for lighting purposes, a court of equity will restrain the forfeiture of the franchise.

> "The forfeiture clause in a deed must always be strictly construed against the grantor, and nothing will be held to cause a forfeiture unless it plainly appears to be such. 17 *Cyc.*, 89. 2 *Devlin, Deeds,* Sec. 793. In order to justify a forfeiture for the violation of the condition, the violation must be wilful and substantial, not merely technical. *Mells v. Evansville Seminary,* 58 Wis., 135. 15 N. W., 133. *Rose v. Hawley,* 141 N. Y., 366. 36 N. E., 335."

Central Christian Church v. Lennon, 59 Wash., 425, 427.

Ill. Bank v. Doud, 105 Fed., 123, 129.

State ex rel Clapp v. Mfg. Co., 41 N. W., 1020, 1025.

High, extraordinary Legal Remedies, Sec. 649.

State ex rel Johnson v. Southern Building & Loan Assn., 31 So., 375.

Kansas City Ry. Co. v. Young, 152 S. W., 118.

State ex rel Dunbar v. Galena Water Co., 65 Pac., 257.

Commonwealth v. Turnpike Co., 97 S. W., 375.

> "Where a duty or restriction is not expressed in terms and does not arise by clear and necessary implication, a violation thereof cannot be fairly regarded as a wilful and culpable breach of duty if done in good faith under claim of

right. The proper course in such cases is to test the right of the matter by other appropriate remedial action; and if the judgment of the court establishes the duty adversely to the service company, thereafter a wilful breach will be culpable in the sense now under discussion."

State v. Birmingham Water Works Co., 64 So., 23, 31.

"It will be seen that nothing remained in the contest but an interpretation of the provision of the contract relating to extensions. The claim was made by the city and denied by the company, that the city might at its option require the laying of additional mains over any of the unoccupied streets. Because of this dispute and refusal, the city asks an absolute annulment of the contract and a forfeiture of all the franchises and privileges under which the company is operating. * * * It appears that a bona fide dispute has arisen over the interpretation of a single provision, but should it be settled in a proceeding for an absolute forfeiture, and should the denial of the claim of the city in one particular be visited by the extreme penalty of civil death? * * * The law, however, does not look with favor on forfeitures, and it would appear that another remedy exists in which an interpretation of the contract may be obtained and complete redress awarded. * * *

In the section of the ordinance relating to forfeitures, the failure to make future extensions of the mains and pipes was not made a ground of forfeiture. * * *

A forfeiture is always abhorred, and according to repeated decisions of this court, it will ordinarily not be declared where there is another adequate remedy."

City of Topeka v. Topeka Water Co., 49 Pac., 79.

City of Olathe v. Ry. Co., 96 Pac., 42.

People v. North River Refining Co., 24 N. E., 834.

State ex rel Johnson v. Southern Building & Loan Assn., 31 So., 375.

Wheeling Electric Co. v. Town of Triadelphia, 52 S. E., 499, 512.

Joyce on Franchises, Sec. 491.

IV.

THE CITY HAVING BEEN FULLY COMPENSATED FOR ALL POWER FURNISHED TO THE NORTHERN PACIFIC RAILWAY AFTER JUNE 2, AND THE POWER COMPANY HAVING OFFERED TO PAY TO THE CITY THE VALUE OF THE POWER FURNISHED BETWEEN MAY 22 AND JUNE 2, 1913, IT WOULD BE ILLEGAL AS WELL AS INEQUITABLE TO ALLOW THE CITY TO INSIST ON THE FORFEITURE OF THE MORTGAGED PROPERTY.

"Where a man, through misapprehension or mistake of the law parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief if, under the general circumstances of the case it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired."

Kerr on Fraud and Mistake, 4th Ed., 467.

South Carolina v. Gilbreath, 208 Fed., 899, 925.

"The general rule that one cannot obtain affirmative relief as against an otherwise well-founded claim on the bare ground of mistake of law, is relaxed where its enforcement will cause injustice, and when such relief can be given without injury to the rights of another."

Reggio v. Warren, 93 N. E., 805.

Bronson v. Leibold, 87 Atl., 979.
Stoeckle v. Rosenheim, 87 Atl., 1006.
2 *Pomery, Eq. Jur.,* 2nd Ed., par. 849.
Bottorf v. Lewis, 95 N. W., 262.
Mead v. Morse, 80 N. E., 513.
Noyes v. Anderson, 26 N. E., 316.
Kopper v. Dyer, 9 Atl., 4.
Dodsworth v. Dodsworth, 98 N. E., 279.
MacTier v. Osborne, 15 N. E., 641.
Hodges v. Buell, 95 N. W., 1078.
Grigg v. Lands, 21 N. J. Eq., 494.
Harley v. Sanitary Dist., 80 N. E., 771.
Ore. R. R. & Nav. Co. v. MacDonald, 112 Pac., 413.

V.

(Specifications 5 and 6.)

THE CITY OF TACOMA HAD NO POWER, BY ITS CHARTER OR BY ORDINANCE, TO PREVENT THE LEGISLATIVE AUTHORITY OF THE CITY FROM GRANTING A FRANCHISE FOR THE SALE OF ELECTRIC POWER FOR LIGHTING PURPOSES.

The charter of the city, adopted in March, 1896, by the freeholders, contained the following provision:

> "The legislative power of the city is forever prohibited from granting to any person or corporation whatever a franchise, privilege or right to sell or supply water or electric lights within the city of Tacoma to the city or any of its inhabitants, as long as the city owns a plant or plants for that purpose and is engaged in the public duty of supplying water or light, except that the city council may grant a franchise to supply water or electric light to any section or part of the city of Tacoma not supplied or fur-

> nished by the city water or light plant, to cease and determine at such time as the city of Tacoma shall furnish and provide water and light in said section or part of the city." (p. 24.)

At the time this charter was adopted, the law of 1890, p. 131, authorizing cities to frame their own charters was in force, and subdivision 7, section 7507, Remington & Ballinger's Code, vested in cities of the first class the power—

> "—to authorize or prohibit the use of electricity at, in or upon any of said streets or for other purposes, and to prescribe the terms and conditions upon which the same may be so used, and to regulate the use thereof."

In 1903, the legislature enacted a law containing the following provision:

> Section 1. "The legislative authority of the city or town having control of any public street * * * may grant authority for the construction, maintenance and operation of transmission lines for transmitting electric power, together with poles, wires and other appurtenances, upon, over, along and across any such public street * * * , and in granting such authority the legislative authority of such city or town * * * may prescribe the terms and conditions on which such transmission line and its appurtenances shall be constructed, maintained and operated upon, over, along and across such road or street."
>
> *Laws of 1903,* p. 360.

At the same session of the legislature, the laws of 1903, p. 364, the legislative authority of cities was authorized to grant—

> "—authority for the construction, maintenance and operation of electric railroads or railways * * * over, along and across any public street * * * and in granting such authority the legislative authority of such city or town * * * may prescribe the terms and conditions upon which such electric railroad or railway * * * shall be constructed, maintained and operated."

It will be observed that the only difference between the two statutes is that one applies to lines for transmitting electric power and the other applies to electric railroads and railways. In each case the power to grant the authority or franchise is vested by the legislature in the legislative authority of the city or town.

The question then arises whether the city charter of Tacoma, adopted in 1896, prohibiting the grant of a franchise for the transmission of electric power for lighting purposes in the city of Tacoma when the city could supply such power for such purpose, continued valid, or whether it was not repealed by the act of 1903 just mentioned. The Supreme Court of the State of Washington, in considering whether the city charter of Seattle, adopted in 1908, could impose restrictions upon the legislative authority in the grant of street railway franchises, under the laws of 1903, p. 364, held that the provisions of the city charter of Seattle requiring the legislative authority to insert certain provisions in such franchises were void because the state had vested the power to grant franchises in the legislative authority of the city and the city charter could

not restrain or impose conditions upon the exercise of the power so conferred.

"We think that, under the statutes of the state, the city council was without authority to submit to the voters for their ratification any ordinance granting a franchise for a street railway company, inasmuch as the power of granting franchises of this kind is vested directly and specifically by the legislature in the legislative authority of the city; that is, in the mayor and city council. For these reasons, the ordinance granting the franchise involved in this action was legal and valid, and it was not necessary nor proper that it should have been submitted to the voters, neither was it necessary to embody the restrictions and limitations provided for in said charter amendments adopted at the municipal election in March, 1908."

Benton v. Seattle Electric Co., 50 Wash., 156, 163.

"It having become the settled law in this state, by the construction repeatedly placed upon the constitution, that a general law enacted by the legislature is superior to and supersedes all freehold charter provisions inconsistent therewith, it becomes plain that, when the legislature, by the laws of 1903 and 1907, gave to the legislative authority of the cities of the state the power to grant street railway franchises and also power to 'prescribe the terms and conditions on which such railways * * * shall be constructed, maintained and operated,' that power cannot be limited or prescribed by freehold charter provisions."

Ewing v. Seattle, 55 Wash., 229, 240.

"We think there is no escape from the conclusion that the ordinance is in conflict with the

city charter. The question then arises, whether this provision of the city charter is valid. In *Benton v. Seattle Electric Co.,* 50 Wash., 156, 96 Pac. 1033, in considering this same charter provision, we held that it was void because in conflict with the laws of 1903, p. 364, as amended by the laws of 1907, p. 192 (Rem. & Ball. Code, 9080), which vests in the legislative authority of the city the power to grant franchises, and because the legislative authority of the city means the *mayor* and *city council.* In *Ewing v. Seattle,* 55 Wash., 229, 104 Pac. 259, we again held that the state law authorizing the mayor and the city council of cities to grant franchises to street railways is conclusive and controls charters of cities of the first class."

Dolan v. Pug. Sd. Traction, Lt. & Pow. Co., 72 Wash., 343, 346.

These three decisions are based upon the law of 1903, p. 364, relating to street railways, the companion law of the law of 1903, p. 360, relating to power lines. There can, therefore, be no doubt that the decisions are just as applicable to the charter provisions of the city of Tacoma limiting the power of the legislative authority of the city in the grant of franchises for electric lighting, as they are to street railways in the city of Seattle, for the language of the grant of power as to each franchise is the same in both acts. There can, therefore, be no controversy over the proposition that the provision of the city charter of Tacoma prohibiting the grant of a franchise for electric lighting, is invalid. It does not follow, however, that if the legislative authority of the city of Tacoma, pursuant to the

legislative grant of power to grant franchises for electric lighting, exercised its discretion and refused to confer the privilege of doing a lighting business under a power franchise, the grantee of the power franchise would become the owner of an electric lighting franchise. Where, however, the legislative authority of the city granted the power company a franchise—

> "For the purpose of transmitting, distributing and selling electric current to be furnished and used for the purpose of furnishing power and heat, or either of them, and the further right to charge for such current a reasonable compensation, and for any other use or uses to which electricity may be put except as hereinafter provided, provided that neither said Tacoma Railway & Power Company nor its successors or assigns shall have any right to supply electric current to be used directly or indirectly for lighting purposes,"

it did not in the exercise of its legislative discretion deny the franchise to the grantee, but it granted the franchise to the grantee coupled with the illegal provision contained in the city charter and incorporated in the proviso, which it believed it had no power to dispense with. The proviso therefore was not legally incorporated in the franchise as the act of the legislative authority of the city. The proviso was the act of the freeholders who framed the city charter. The portions of the franchise other than the proviso were the results of the exercise of discretion by the legislative authority of the city. The proviso was no act of the legislative authority, and therefore in law is not to be read into the franchise.

"If the city had attempted to grant such privileges (a franchise) to a telephone company, so as to disable itself from consenting to the construction of another telephone system through its streets, such attempt would be void and beyond its power. The city cannot by ordinance or contract disable itself to consent to the erection of telephone lines upon its streets. *The volition to consent or refuse is one of the powers vested by the legislature in cities of the first class, and this continuing power cannot be divested without the sanction of the legislature.*"

State ex rel Telegraph Co. v. Spokane, 24 Wash., 53, 59.

North Springs Water Co. v. Tacoma, 21 Wash., 517, 529.

"The principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or delegated to others."

McQuillan on Municipal Ordinances, p. 128.

"A municipal corporation *cannot divest itself* of its governmental functions conferred by the legislature by a surrender, or impair its right to exercise such functions as may be necessary and proper for the public good."

20 *A. & E. Cyc. of Law,* 2nd Ed., 1142.

4 *Supp. A. & E. Encyc. of Law,* p. 95, note 8.

Mayor v. Flack, 64 Atl., 702, 709.

Vandalia R. R. Co. v. State, 76 N. E., 980, 984.

Atty. Gen. v. Lowell, 38 Atl., 270, 271.

"*A legislative power granted to a municipal corporation cannot be parted* with unless such

> was the clear intent of the legislature, for *it never will be presumed that the legislature, having granted the power,* has at the same time *authorized a surrender of it.* The authority *to surrender the power* must appear from the *'clear letter of the law.'"*
>
> *National Water Works Co. v. City of Kansas,* 20 Missouri Appeals, 237, 242.

In a case where the court denied the right of the board of trustees of the city of Alameda to suspend a power conferred upon it by the legislature until an election could be held to ascertain the wishes of the voters in reference to granting a franchise, the court said:

> "But we deem it immaterial whether the longer or the shorter period be taken. In either case it is obvious that it was *beyond the powers of the board* by ordinance or otherwise to divest itself and succeeding boards, for a longer or shorter period, of powers vested in it by the general law for the benefit of its constituents; *for this would be to repeal pro tanto the general law."*
>
> *Thompson v. Board of Trustees,* 77 Pac., 951.

Inasmuch, therefore, as after the enactment of the law of 1903 vesting in the legislative authority of cities the power to grant franchises for power lines, the city of Tacoma could not have incorporated into its city charter a provision prohibiting the legislative authority of the city from exercising such power, it necessarily follows that the previous prohibition upon the exercise of such power con-

tained in the charter of 1896 became invalid upon the enactment of the law of 1903.

The franchise of the Power Company, involved in the present case, was granted in February, 1905, after the enactment of the law of 1903, which law is still in force.

The franchise, therefore, we submit, should be read as containing all of the provisions except the proviso, and the proviso should be eliminated because it was not a condition inserted by the legislative authority of the city and was void.

Murphy v. Worcester Consolidated St. Ry., 85 N. E., 507, 509.

In re Kings County Elevated Ry., 13 N. E., 18.

Galveston & W. Ry. Co. v. City of Galveston, 39 S. W., 96.

Galveston & W. Ry. Co. v. Galveston, 155 S. W., 273, 282.

State ex rel Grinsfelder v. Spokane St. Ry., 19 Wash., 518.

Crawford v. O'Shea, 75 Wash. 33, 44.

Illinois St. Board v. People, 13 N. E. 201.

That the legislative authority of the city did not exercise its discretion as to the proviso because it denied the authority vested in it by the legislature to exercise such discretion and felt bound by the charter provision, plainly appears from the language of the resolution revoking the permit to supply electric current. (Answer, Exhibit C.)

8.

THE CITY OF TACOMA COULD NOT LEGALLY INSERT IN A FRANCHISE A PROVISION THAT AS TO A CERTAIN CLASS OF BUSINESS, THE CITY SHOULD HAVE A MONOPOLY.

The legislative authority of the city in granting this franchise was exercising a power delegated by the legislature. It could not grant a franchise which would creat a monopoly. It follows, therefore, that it could not insert a reservation which would create a monopoly in favor of the city. The city had no power to accept such a monopoly, except from the state, and the state had conferred upon the city no authority to create or accept a monopoly. Section 8005 of Rem. & Ball. Codes & Statutes, while authorizing cities to construct and acquire public utilities, contains not the slightest intimation of the power to create a monopoly in favor of such utilities. There being no grant of power to create a monopoly, the city was without such power. It could not reserve a power it had not been granted.

> "That grants to municipal corporations, like grants to private corporations, are subject to the rule of strict construction was announced by this court in *Citizens' Street Railway v. Detroit Ry.,* 171 U. S., 48, following and applying the doctrine of previous cases. It was said that the power to grant an exclusive privilege must be expressly given, or if inferred from other powers, must be indispensable to them, and that this principle was firmly fixed by authority."

Water, Light & Gas Co. v. Hutchinson, 207 U. S., 385, 393.

Citizens' Street Ry. v. Detroit, 171 U. S., 48.

Joyce on Monopolies, Secs. 277, 280.

State ex rel Armstrong v. Waseta, 142 N. W., 319.

City of Montgomery v. Greene, 60 So., 900.

Wagner v. Rock Island, 34 N. E., 545.

Brunns Appeal, 12 Atl., 855.

Wigal v. City of Parkersburg, 81 S. E., 554.

In *Springfield City v. Springfield Gas Co.,* 31 Ohio Circuit Court Reports, 446, affirmed in 91 N. E. 1139, the court said:

> "Under the rule that one has the right to make such use of his property as one may choose, such use not being unlawful nor injurious to the person or property of others, the purchaser of natural gas, after the commodity became his property, may use it for lighting his premises upon a compliance with the company's method for its deliverance.
>
> A municipality has not the authority to prescribe by ordinance that its inhabitants shall not use property acquired for any purpose, neither dangerous nor injurious.
>
> This court held, in the case of *State v. Traction Co.,* 10 Cir. Dec. 212 (18 Re. 490) that where a city grants permission to a street railway company to construct its road in its streets, *it may not do so upon the condition that the company does not exercise one of its corporate powers,* and therefore a condition or regulation that the company shall not carry freight is void. This judgment was afterwards affirmed by the Supreme Court, *State v. Traction Co.,* 64 Ohio, St. 272 (N. E. Vol. 60, page 291).
>
> If a city ordinance containing such regulation is void for the want of power to exact such a condition, it follows, we think, that an ordinance limiting the use of a commodity, such as nat-

> ural gas, conceded to be safe and available for illuminating purposes, to that of fuel, heat and power, is void also for the same reason. If the city cannot in the one case, for the lack of power, require the corporation to contract away the right to exercise one of its corporate powers, it would certainly be without power in the other case to deprive the city and its inhabitants, by ordinance, of a common right."

In *People ex rel City of Los Angeles v. Los Angeles Independent Gas Co.,* 89 Pac. (Cal.) 109, the court said:

> "The gas is delivered to the consumer at certain meters on their premises, and after it passes beyond the meters it is the property of the consumer, and defendant has no further control over it. Some of these consumers use the gas, not only for illuminating purposes, but also for heating and cooking, and a few—not more than one in fifty—use it for heating purposes exclusively. It may be assumed that defendant knew that some of the gas furnished by it was used for heating, as well as illumination. And the contention of appellant is that the franchise of having pipes in the streets has been forfeited because the gas furnished by it has not been used for illumination alone, but has been used also for other purposes above mentioned. This contention is, in our opinion, not maintainable. Indeed this court has determined the matter adversely to appellant's contention by its decision in *re Johnson,* 137 Cal. 115, 69 Pac. 973, and in *Denninger v. Recorders' Court,* 145 Cal. 629, 638; 79 Pac. 360."

It is to be borne in mind that a municipal corporation, in lighting its streets, may be exercising a governmental power, but when a municipal corporation goes into the private business of furnishing

light to its inhabitants for profit, then it is governed by the same rules which apply to other corporations and to individuals.

In *South Carolina v. U. S.,* 199 U. S. 437, 463, the Supreme Court quoted with approval from *Western Savings Fund Society v. Philadelphia,* 31 Pa., St. 175, the following language:

> "The supply of gas light is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough, or a city, it is *a special private franchise,* made as well for the private emolument and advantage of the city as for the public good. * * * If the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, *the corporation quoad hoc is to be regarded as a private company.* It stands *on the same footing* as with any individual or *body of persons* upon whom the *like special franchises had been conferred.*"

The city of Tacoma had, therefore, no power to insert in the franchise a provision creating for itself in its private capacity a monopoly in the lighting business. It is to be borne in mind that in this case the ground of complaint against the Power Company was not that the Power Company was doing anything upon the streets of the city which should not be done, but that the Power Company, doing upon the streets of the city what the city had granted the Power Company a franchise to do, should forfeit its franchise because the purchaser of the

power, on its own premises, converted the power into light, and the city claimed that it was entitled to a monopoly of the lighting business, not only upon the streets of the city, but in the private residences of its citizens.

VI.

(Specification 10.)

THE CITY HAD UNDER NO CONDITIONS THE RIGHT TO FORFEIT TO ITS OWN USE THE PHYSICAL PROPERTY OF THE POWER COMPANY SUBJECT TO APPELLANT'S LIEN WITHOUT THE JUDGMENT OF A COURT IN A PROCEEDING TO WHICH APPELLANT WAS A PARTY.

Baldwin v. Smith, 82 Ill., 162.

People v. Ry. Co., 27 Pac., 673.

Nebraska Telephone Co. v. City of Fremont, 99 N. W., 811.

Foster v. City of Joliet, 27 Fed. R. 899.

Southern Bell Co. v. City of Mobile, 162 Fed. R. 523.

Iron Mountain R. Co. v. Memphis, 96 Fed. R. 123.

The language in the case of *Wheeling R. R. Co. v. Triadelphia,* 52 S. E., 499, 510, cited above, is quite pertinent to this case:

> "While the town has the right to require full and complete performance of all covenants on the part of the railway company, and is not bound to accept a mere substantial performance, its authorities, in proceeding to take away the rights of the company pursuant to the terms of the ordinance, must deal frankly and fairly with it. They must act in good faith and not endeavor to pervert this forfeiture clause to a purpose for which it was never intended. Neith-

> er party ever supposed it would be used for any purpose except to compel performance of the covenants entered into by the railway company. * * *

In *Wakefield v. Village of Theresa,* 109 N. Y. Supp., 414, 417, the court said:

> "The real animus of the attempt to remove the plaintiff's plant apparently is to get rid of a competitor to the new municipal lighting system."

It seems in the case at bar, that there is a similar animus; but appellee must remember that in this case the attempt is not simply to take the property of the Power Company, it is an attempt to take trust property away from the trustee who holds it for innocent bondholders who had no notice of any of the proceedings, who was not a party to the litigation, and who has come into a court of equity asking that its *cestuis que trustent* should not be despoiled.

We submit that whether the case be viewed from the standpoint of the common law, or be dealt with in accordance with the rules of equity and fair dealing, the decree appealed from should be reversed and the prayer of appellant's bill granted.

Respectfully submitted,

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Note.—Matter italicized in this brief not italicized in original.